Supreme Court, U.S.
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(1)

No. _____

In the Supreme Court of the United States

TOMMY D. JARRELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court erred in applying the "good faith exception" to the exclusionary rule from United States v. Leon, 468 U.S. 897 (1984), to hold that officers can reasonably rely upon law enforcement practices, such as thermal imaging, that were subsequently declared unconstitutional by this Court.

2. Whether the district court erred in holding that the Petitioner had no right to appeal the denial of his request for a downward departure under U.S.S.G. § 5k2.13 for diminished capacity, as denial of any right to appeal under these circumstances is unsupported by any rational basis and is therefore violative of the Petitioner's right to due process of law under the Fifth Amendment.

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

No persons or entities are parties to this proceeding other than those appearing in the caption of this case.

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The opinion and order of the United States District Court for the Sixth Circuit dismissing the Petitioner's appeal are reproduced in the Petitioner's Appendix at 1a. Although the opinion is unpublished in the Federal Reporter, it may be located at United States v. Jarrell, 68 Fed. Appx. 622, 2003 WL 21500171, 2003 U.S. App. LEXIS 13053 (6th Cir., June 25, 2003).

The order of the United States District Court for the Eastern District of Tennessee dismissing the Petitioner's motion to suppress is also unpublished, but it is not available through major on-line legal research services. It is reproduced in the Petitioner's Appendix at 12a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 25, 2003, and the Petitioner made no request for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.S.G. § 5k2.13:

A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117 of title 18, United States Code. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

STATEMENT OF THE CASE

Factual Background:

The essential facts of this case are simple and undisputed. On December 21, 1999, Special Agent Rodd Watters of the Tennessee Bureau of Investigation executed a search warrant on the residence of the Petitioner, Tommy Jarrell. The search warrant was issued by the magistrate upon the affidavit of Agent Watters, who stated his belief that the Petitioner was growing marijuana in an outbuilding on the Petitioner's property. The affidavit was based, in large part, upon information provided by a confidential informant, who had contacted Federal Bureau of Investigation Task Force Agent Kim Rively. Agent Rively, in turn, relayed this information to Agent Watters. This information was set forth in the affidavit itself:

> The informant, who has not provided any information in the past, advised that a subject living in Chattanooga, at the present time, was growing marijuana with the aide of indoor growing equipment. The informant advised that, TOMMY D. JARRELL, a person known by the informant, was growing marijuana in an old garage located in the rear of the property located at 507 Tunnel Blvd. The informant also advised that JARRELL had approximately $20,000.00 worth of growing equipment, including lights that hang from the ceiling, in the garage. The informant also stated that he/she had been in the grow in the last thirty (30) days and the grow was active. This informant advised that JARRELL had two large rottweiler dogs positioned outside of the old garage.

Based on this information, Agent Watters and another agent visited the Petitioner's residence on December 10, 1999. They confirmed that the Petitioner's residence fit the informant's description, and they noticed that the doors and windows of the detached building were covered with plywood. They also saw a "beware of dog" sign on the front corner of the residence and a large rottweiler was chained near the front of the garage. Finally, the agents saw two or three electrical drop cords and "a garden hose running from the main residence to the detached garage."

Agent Watters then obtained a subpoena to obtain the Petitioner's electrical power usage from the Chattanooga Electrical Power Board. He also obtained the electrical power usage records for two other nearby residences. According to the affidavit subsequently submitted, the usage records revealed that the Petitioner's residence used two to three times that which was used at one of the other addresses, and four to five times that which was used at the other address.

At this point, Agent Watters then decided to conduct thermal imaging of the detached building to determine whether the building was emitting extreme heat. On December 16, 1999, Agent Watters conducted the thermal imaging on the detached garage at the Petitioner's residence and two other similarly situated outbuildings. He found what he stated was a very strong heat signature emitting from the detached garage at the Petitioner's residence. According to Agent Watters, neither of the other residences emitted a heat signature comparable to the Petitioner's residence. Based on this information, a search warrant was then issued by a Hamilton County, Tennessee, General Sessions judge on December 20, 1999. Upon executing the search warrant the next day, the agents seized, among other things, 124 growing

marijuana plants, marijuana grow lights, ballasts, growing soil, and fertilizer.

Procedural Background:

The Petitioner was indicted by a federal grand jury on October 24, 2000, in a one count indictment that alleged violations of 21 U.S.C. § 841(b)(1)(B). Consequently, the United States District Court for the Eastern District of Tennessee possessed original jurisdiction over this action pursuant to 18 U.S.C. § 3231, which provides that "[t]he district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, or all offenses against the laws of the United States."

On December 6, 2000, the Petitioner moved to suppress the warrant authorizing the search of his property, alleging, among other things, that (1) the use of the thermal imaging device was unlawful because it was made without a warrant; (2) the affidavit contained no facts supporting the veracity or reliability of the confidential informant; and (3) that the affidavit was so lacking in probable cause that officers could not have relied upon a warrant issued from that affidavit.

After holding a hearing on the Petitioner's motion to suppress, the district court denied the motion on August 9, 2001. The court agreed that the use of thermal imaging, which was accomplished without a warrant, was rendered unconstitutional by this Court's decision in United States v. Kyllo, 533 U.S. 27 (2001). (See App. B, at 18a-19a.) In looking to the remainder of the affidavit, the court held that it was insufficient to support probable cause to believe the Petitioner was engaged in illegal activity. In particular, the court agreed that the affidavit did not sufficiently establish that the confidential informant was reliable, (App. B, at 19a-

20a), and it held that without the thermal imaging data, the "affidavit falls short of establishing probable cause," (App. B, at 23a-24a).

However, the district court found that, despite the lack of probable cause, suppression of the search was not appropriate. Instead, the court found that the "good faith" exception to the exclusionary rule announced in United States v. Leon, 468 U.S. 897 (1984), applied in this case and that the agents could reasonably rely upon a warrant issued, in part, as a result of thermal imaging. (App. B, at 25a-26a.) The court based its decision, in part, on the finding that the agent's belief in the validity of thermal imaging was not unreasonable, because four federal circuits had found the use of the device constitutional. (App. B, at 25a.)

Thereafter, the Petitioner entered a conditional guilty plea to the indictment, and the U.S. Probation Officer prepared the customary Presentence Report. The government expressed no objections to the report, while the Petitioner requested a downward departure under section 5K2.13 of the United States Sentencing Guidelines.

On September 17, 2001, the court accepted the conditional plea, and found the Petitioner guilty of manufacturing marijuana. In accordance with the Presentence Report, the court found the Petitioner to have an offense level of 13 and a criminal history category of I. The court declined the Petitioner's downward departure request, though it did depart from the guideline range three levels in response to the Petitioner's acceptance of responsibility under section 3E 1.1. Ultimately the Petitioner was sentenced to serve 13 months with the Bureau of Prisons, and ordered to be placed on supervised release for four or five years after his release from prison.

The Petitioner appealed the denials of his motion for suppression and his request for a downward departure pursuant to section 5K2.13. On June 25, 2003, the United States Court of Appeals for the Sixth Circuit issued its opinion, holding that the Leon "good faith" exception did apply to the facts of this case and that the agents could, in executing a warrant, reasonably rely upon a police practice that was later declared unconstitutional. (App. A, at 6a-a7.) The court also held that a district court's refusal to grant a downward departure under the sentencing guideline is unreviewable by a defendant on appeal. (App. A, at 9a-10a.) The Petitioner now comes before this Honorable Court to respectfully request that it grant his petition for writ of certiorari to review the judgments of the lower courts.

REASONS FOR GRANTING THE PETITION

I. An Important Question Of Law, Which Is Necessary For The Proper Administration Of The Criminal Justice System, Is Presented As To Whether The Exclusionary Rule Should Apply To Law Enforcement Practices That Are Subsequently Ruled To Be Unconstitutional.

This Court is presented with an extremely important question of law whose resolution is necessary for the proper administration of the criminal justice system. The Sixth Circuit held that because the officers relied in good faith upon a warrant issued, in part, on the basis of thermal imaging data, the evidence seized as a result of that search was admissible—notwithstanding that the thermal imaging scan itself was an unconstitutional search. The intermediate court did so based on its belief that the agents acted reasonably in relying upon the thermal imaging data, (App. A. at 6a-7a), and as such, the court held that the "good faith" exception to

the exclusionary rule adopted by this Court in Leon saved the evidence from suppression.

However, despite the clear command of the Fourth Amendment that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, *shall not* be violated," (emphasis added), the decision of the Sixth Circuit in this regard is far too limited, as it does not account for the policies served by the exclusionary rule. Although not directly stated by the court, the entire opinion in this regard seems to have been limited to deciding whether the officers had acted wrongly, and thus would be deterred in future cases were the evidence in this case suppressed.

Thus, the issue before the Court is really one of the values that we, as a maturing society based on the rule of law, seek to protect. Although Leon speaks of the exclusionary rule only in terms of the need to discourage police misconduct, this proposition should not be the only constitutional master that is served by the exclusionary rule. Indeed, the historical development of the exclusionary rule reveals plainly that the rule's real purposes were thought by this Court to be much broader than that of Leon's limited scope.

In Weeks v. United States, 232 U.S. 383, 392 (1914), this Court believed that the exclusionary rule was necessary to keep the courts from becoming party to the designs of "those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures." Indeed, this Court recognized in that case that the Fourth Amendment was necessarily a limitation on the "power and authority" of the "courts of the United States," as well as a limitation on the powers of federal officials. Id. at 391-92.

Indeed, this very principle was strongly reaffirmed in Elkins v. United States, 364 U.S. 206, 222 (1960), wherein this Court stated, with regard to the reasons supporting an exclusionary rule applying to state officers, "But there is another consideration -- the imperative of judicial integrity." Rather poignantly, the Elkins Court announced that the exclusionary rule would apply to evidence seized by state officers by reasoning as follows:

> [In McNabb v. United States, 318 U.S. 332 (1943),] it was held that "a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law." Even less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold.

364 U.S. at 223 (internal citations omitted). Similar affirmations of the role of the courts in ensuring that the Fourth Amendment have real meaning are seen in the landmark case of Terry v. Ohio, 392 U.S. 1, 13 (1968), wherein this Court was clear stated that "[c]ourts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."

In Leon, this Court gave some acknowledgment to the proposition that judicial integrity can serve as a basis for applying the exclusionary rule. Though recognizing that it could not provide a justification in most cases, the "integrity of the courts" could be so damaged as to warrant suppression

in "unusual circumstances." Leon, 468 U.S. at 921 n.22.[1] Accordingly, despite Leon's statements regarding the limited policies served by the exclusionary rule, this Court has not always held that the exclusionary rule is singularly supported by the need to deter unlawful police conduct. See United States v. Janis, 428 U.S. 433, 458 n.35 (1976) (describing "judicial integrity" as one factor, though a subordinate factor to deterrence in some cases, that supports application of the exclusionary rule).

The Petitioner has uncovered no decision from this Court since Leon that has addressed the validity of searches based on warrants where the case law or legal precedent supporting them has been reversed or overruled. Rather, this Court appears only to have addressed cases in which reliance was placed on a subsequently invalidated statute, Illinois v. Krull, 480 U.S. 340, 358 (1987), or in which reliance was placed on a subsequently invalidated warrant, see Massachusetts v. Sheppard, 468 U.S. 981, 990 (1984). This case, therefore, presents this Court with the opportunity to consider an issue that if of first impression in it volumes of decisions.

The Sixth Circuit incorrectly declined to address the role of judicial integrity in cases in which the search is based on a warrant relying upon subsequently invalidated legal

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[1] Citing Leon, this Court later suggested that "[i]n determining whether to apply the exclusionary rule, a court should examine whether such application will advance the deterrent objective of the rule." See Illinois v. Krull, 480 U.S. 340, 353 (1987). However, the Krull Court made no mention of the fact that "unusual circumstances" could raise other concerns justifying suppression. Presumably, the Court did not intend, by its silence, to eliminate the other rationales supporting the exclusionary rule as the Sixth Circuit has done in this case.

precedent. Essentially, the failure to suppress evidence seized as a result of a subsequently invalidated measure is to improperly deny that decisions of constitutional significance are not to be given effect in cases that are pending at the time of the new rule is announced.

However, as this Court has recognized, "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." Griffith v. Kentucky, 479 U.S. 314, 322 (1987); see also Teague v. Lane, 489 U.S. 288 (1989) (holding that newly declared Constitutional rules should be applied retroactively). Although this case was pending at the time of Kyllo, the district court and the Sixth Circuit essentially overlooked or ignored the clear violation of the Petitioner's civil liberties. Indeed, this very principle was recognized, in the context of Kyllo itself, in United States v. Holmes, 175 F. Supp. 2d 62 (D. Me. 2001). In Holmes, the court stated plainly:

> To say that an exception exists under the Leon rule to the application of the United States Supreme Court's holding in Kyllo . . . , which would permit the principle of the Kyllo holding to be ignored in this post-Kyllo case, to Defendant's prejudice, creates logical and rationalogical anomalies in implementation of Fourth Amendment doctrine of a decidedly perverse effect.

Id. at 73.

For similar reasons, this Court should not so easily recognize a constitutional violation that has no practical remedy. It is not an antiquated notion to suggest, as this Court did long ago, that "[t]he very essence of civil liberty

certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); see also Baker v. Carr, 369 U.S. 186, 208 (1962). By recognizing a Leon-type of exception to the exclusionary rule in this limited context, the Court will permit a fundamental miscarriage of justice: that of hearing the thunder of a plain and clear violation of constitutional commandment, but then locking the doors of the courthouse when the victims of that violation come seeking the shelter of a remedy.[2]

Indeed, should the Court permit the clear constitutional violation in this case to go unremedied, then the Court will necessarily become party to that violation, forever damaging its historic role, and that of the federal judiciary generally, as a protector of civil liberties under our charter of government. Even more importantly, however, such a course will further eliminate any notion that

> a central purpose of our written Constitution, and more specifically of its unique creation of a life-tenured federal judiciary, was to ensure that

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[2] In this respect, this case presents a question much different than was presented in Illinois v. Krull, 480 U.S. 340, 353 (1987). In Krull, the officers relied upon an administrative statute that enjoyed a strong presumption of constitutionality. However, in this case, the actions of Agent Watters in taking the thermal scan enjoyed no similar protection. Indeed, the constitutionality of thermal imaging had yet to be decided in the Sixth Circuit, and the first court in the Sixth Circuit to address the practice only three months later declared it unconstitutional. See United States v. Elkins, 95 F. Supp. 2d 796 (W.D. Tenn. 2000) (March 6, 2000). Consequently, considerations of judicial integrity weigh far more heavily here than they did in Krull.

> certain rights are firmly secured against possible oppression by the Federal or State Governments. . . . [T]he Court must be ever mindful of its primary role as the protector of the citizen and not the warden or the prosecutor.

Florida v. Meyers, 466 U.S. 380, 385 (1984) (Stevens, J., dissenting).[3]

Accordingly, for these reasons, the Petitioner urges the Court to examine whether one of Leon's "unusual circumstances" justifying concern for judicial integrity arises when a new rule of constitutional law has been announced by the courts.

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[3] This Court has recognized that James Madison, the Father of the Constitution, envisioned this precise role for the federal courts. In Davis v. Passman, 442 U.S. 228, 241-42 (1979), this Court quoted Madison's statement to Congress as he presented the Bill of Rights:

> If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; *they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive*; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

(emphasis added).

II. An Important Question Of Law, Which Is Necessary For The Proper Administration Of The Criminal Justice System, Is Presented As To Whether An Appellate Court May, Consistent With The Requirements Of Due Process Of Law, Refuse Review Of A District Court's Failure To Grant A Downward Departure Under The Sentencing Guidelines.

This Court is also presented with an extremely important issue of first impression and one whose resolution is essential to the proper functioning of the criminal justice system. Currently, there has developed among the circuit courts of appeals a solid prohibition against a criminal defendant appealing a district court's denial of a downward departure under the sentencing guidelines. For example, as the Sixth Circuit recently stated in United States v. Price, 258 F.3d 539 (6th Cir. 2001), such decisions are not appealable

> as long as (1) the District Court properly computed the guideline range, (2) the District Court was not unaware of its discretion to depart downward from the guideline range, and (3) the District Court did not impose the sentence in violation of law or as a result of the incorrect application of the Sentencing Guidelines.

Id. at 547-48 (citation and internal quotations omitted). Similar prohibitions on a defendant's right to appeal are recognized in most other circuits as well. See, e.g., United States v. Stevens, 223 F.3d 239, 247 (3d Cir. 2000); United States v. Rodriguez, 30 F.3d 1318, 1319 (10th Cir. 1994); United States v. Chase, 174 F.3d 1193, -1194 (11th Cir. 1999).

The Petitioner does not contend that his case falls within any one of these exceptions developed by the intermediate courts of appeals. However, he does assert that this Court should nevertheless recognize that the Due Process Clause of the Fifth Amendment requires some minimal level of appellate review of a district court's refusal to grant a downward departure.

The Fifth Amendment to the Constitution of the United States provides that "No person shall . . . be deprived of life, liberty, or property without due process of law . . . ." Although "due process of law has never been a term of fixed and invariable content," see, e.g., FCC v. WJR, The Goodwill Station, 337 U.S. 265, 275 (1949), "the phrase expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty," see Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24-25 (1981). As one must readily admit, the Constitution of the United States has not been interpreted to grant criminal defendants an inherent right appellate review of errors occurring at trial or sentencing. See McKane v. Durston, 153 U.S. 684 (1894).

However, as this Court acknowledged in Evitts v. Lucey, 469 U.S. 387, 393 (1985), once a system of appeals has been established, then "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."[4] Indeed, it is well

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[4] Of course, Evitts involved the constitutionality of state appellate procedures under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. However, because due process protections under the Fifth and Fourteenth Amendments are substantively identical, see Curry v. McCanless, 307 U.S. 357, 370 (1939), this distinguishing

established that a defendant has a right to due process of law during all aspects of the sentencing stage. See, e.g., United States v. Pugliese, 805 F.2d 1117, 1122-23 (2d Cir. 1986); Shelton v. United States, 497 F.2d 156, 159 (5th Cir. 1974) United States v. Satterfield, 743 F.2d 827, 840 (11th Cir. 1984).

Indisputably, the Congress of the United States has provided for a system of appeals by enacting 18 U.S.C. § 3742 (1994). However, this system of review unreasonably restricts the issues that a defendant can raise on appeal, thereby failing to comport with the most essential requirement of due process: fundamental fairness.

For example, 18 U.S.C. § 3742(a) allows a defendant to seek appellate review of a sentence only under four circumstances: (1) the sentence "was imposed in violation of law"; (2) the sentence "was imposed as a result of an incorrect application of the sentencing guidelines"; (3) the court granted an upward departure; or (4) the sentence "was imposed for an offense for which there is no sentencing guideline and [the sentence] is plainly unreasonable." Thus, as far as a defendant is concerned, the discretion of the sentencing judge regarding downward departures is completely unfettered, and a decision to deny a downward departure may be made for any reason, or no reason at all.

By way of contrast, however, the Government of the United States is always permitted the right to appeal the *grant* of a motion for downward departure. See 18 U.S.C. § 3742(b)(3). In essence, then, the statute creates a situation in which appellate review of a district court's

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characteristic is of no consequence for purposes of this petition.

decision to grant a downward departure depends wholly upon whether the government lost its fight in the trial court. If it did lose, then the government may seek review of the district court's decision-making process; if it did not, then the district court's decision-making process is wholly unreviewable.

The Due Process Clause of the Fifth Amendment requires, at a minimum, that all legislation "be rationally related to legitimate government interests." See, e.g., Washington v. Glucksberg, 521 U.S. 702, 728 (1997); Lawrence v. Texas, __ U.S. __, 123 S. Ct. 2472, 2484 (2003) (striking law as unconstitutional when it "furthers no legitimate state interest"). The procedure required by 18 U.S.C. § 3742 in no way rationally furthers a legitimate governmental interest, because it permits the government to appeal a decision adverse to its interests, but then requires courts to turn a deaf ear when the defendant receives a decision adverse to his or her interests.

Consequently, the fundamental requirements of due process of law demand that the defendant be allowed some modicum of meaningful appellate review in this context, at least so long as the government has the same privilege. Although section 3742 could conceivably deny all parties the opportunity to appeal grants of downward departures, it may not, consistent with notions of "fundamental fairness," allow only one party to appeal adverse decisions in this context.

Importantly, perhaps the only "rational" basis justifying the disparity present in section 3742 is as follows: that by restricting the defendant's ability to appeal, the appellate courts can more adequately devote judicial resources to other issues. However, although restricting appellate issues may be justified by efficiency and conservation of judicial resources, "the Constitution recognizes higher values than speed and

efficiency." See Stanley v. Illinois, 405 U.S. 645, 656 (1972); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 646 (1974). Consequently, the need for efficiency in appeals cannot, in and of itself, serve as a basis for restricting the access of only one party to meaningful appellate review, and because this statute cannot be justified on other grounds, it must necessarily fail rational basis scrutiny.

To recognize that basic notions of fundamental fairness and reasonableness require that meaningful appellate review be extended to *both* parties in a criminal case in no way jeopardizes the mandate of 18 U.S.C. § 3742(e) that appellate courts "give due deference to the district court's application of the guidelines to the facts." Indeed, if an abuse-of-discretion standard is consistent with this objective when the Government seeks an appeal of a downward departure decision, see Koon v. United States, 518 U.S. 81, 100 (1996), the same standard can be applied, with similar results, when a defendant seeks appeal of the same decision.

Accordingly, the Petitioner respectfully requests that this Honorable Court examine 18 U.S.C. § 3742 in light of due process requirements and conclude that principles of fundamental fairness demand that he be afforded some meaningful appellate review of his sentence.

CONCLUSION

For the foregoing reasons, this Honorable Court should grant the Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 02-5067

[Filed June 25, 2003]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	)
TOMMY D. JARRELL, Defendant-Appellant.	)

On Appeal from the United States District Court for the Eastern District of Tennessee

JUDGES: Before CLAY and GIBBONS, Circuit Judges; and DUGGAN,* District Judge.

OPINION

PATRICK J. DUGGAN, District Judge. Defendant-Appellant, Tommy D. Jarrell (Jarrell), entered a conditional

* The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

plea of guilty in the United States District Court for the Eastern District of Tennessee on one count of violation of 21 U.S.C. § 841(b)(1)(B). Jarrell's plea was conditioned on being able to challenge the search that formed the basis for the indictment and being able to appeal any decision of the court regarding this challenge. The district court denied Jarrell's motion to suppress and Jarrell subsequently entered his guilty plea. After the pre-sentence report was prepared, Jarrell objected to the report and moved for a downward departure under United States Sentencing Commission, Guidelines Manual, § 5K2.13 (Nov. 2000), for diminished capacity. The district court denied Jarrell's motion and sentenced Jarrell to 13 months of imprisonment and three years of supervised release. Jarrell filed a timely appeal of the district court's denial of his motion to suppress and his motion for downward departure.

Background

On October 24, 2000, Jarrell was indicted on one count of violation of 21 U.S.C. § 841(b)(1)(B) for manufacturing in excess of 100 marijuana plants. This Indictment arose out of information received from a confidential informant. The confidential informant had contacted Federal Bureau of Investigation Task Force Agent Kim Rively, who in turn contacted Special Agent Rodd Watters of the Tennessee Bureau of Investigation. As set out in the Affidavit for Search Warrant by Agent Watters:

> The informant, who has not provided any information in the past, advised that a subject living in Chattanooga, at the present time, was growing marijuana with the aide of indoor growing equipment.

> The informant advised that, TOMMY D. JARRELL, a person known by the informant, was growing marijuana in an old garage located in the rear of the property located at 507 Tunnel Blvd. The informant also advised that JARRELL had approximately $20,000.00 worth of growing equipment, including lights that hang from the ceiling, in the garage. The informant also stated that he/she had been in the grow in the last thirty (30) days and the grow was active. This informant advised that JARRELL had two large rottweiler dogs positioned outside of the old garage. This informant is not working off any charge, nor are any charges pending, nor has the informant asked for any reward in this case.

Based on this information, Agent Watters and another agent visited the location on December 10, 1999. Agent Watters found the residence at 507 Tunnel Blvd. fit the description that the informant had given. Agent Watters noticed that the doors and windows of the detached garage on the premises were covered with plywood, there was a "beware of dog" sign on the front corner of the residence, a large rottweiler was chained near the front of the garage, and there were two to three electrical drop cords and "a garden hose running from the main residence to the detached garage."

Based on this information, Agent Watters issued a subpoena to the Electrical Power Board to obtain electrical power usage records for two years on the 507 residence and two other nearby residences on the same side of Tunnel Blvd. According to Agent Watters' affidavit for a search warrant, the usage records revealed that the 507 residence used two to three times that which was used at one of the other addresses,

and four to five times that which was used at the other address. In addition, Agent Watters asserted that the electricity was not being billed to Jarrell.[1]

Agent Watters decided to conduct thermal imaging of the detached garage to determine whether "Grow Lights," which emit extreme heat, were present. On December 16, 1999, Agent Watters conducted the thermal imaging on the detached garage at the 507 residence and two other similarly situated garages. He found a very strong heat signature emitting from the detached garage at the 507 residence. Neither of the other two heat signatures Agent Watters obtained from the other residences were comparable to the 507 residence. A search warrant was then issued based on this Affidavit.

The search warrant was executed on December 21, 1999. The agents found "an extensive indoor marijuana cultivation operation which included 124 growing marijuana plants, marijuana grow lights, ballasts, growing soil, fertilizer, nutrients, etc. in the detached garage of 507 Tunnel Blvd."

Discussion

Jarrell appeals the district court's denial of his motion to suppress and the district court's denial of his motion for downward departure of his sentence pursuant to USSG § 5K2.13.

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[1] Agent Watters's affidavit states: "based on training and experience it is normal practice for persons involved in indoor cannabis operations to not have bills put in their own names."

Motion to Suppress:

Jarrell filed a motion to suppress in the district court, arguing, *inter alia,* that the search warrant violated the Fourth Amendment. The district court found that because of the Supreme Court's decision in *Kyllo v. United States*, 533 U.S. 27, 150 L. Ed. 2d 94, 121 S. Ct. 2038 (2001), the thermal imaging used by Agent Watters, without a separate search warrant for the thermal imaging, was a Fourth Amendment violation and, therefore, could not be considered in determining whether a search warrant should issue. Without the thermal imaging, the district court found that "the question of probable cause is quite close, but just misses the mark." The court, however, applied the good faith exception enunciated in *United States v. Leon*, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984), and denied Jarrell's motion. Jarrell appeals the court's decision. This Court reviews a district court's findings of fact on a suppression issue under the clearly erroneous standard, and its conclusions of law under a de novo standard. *United States v. Avery*, 137 F.3d 343, 348 (6th Cir. 1997).

In *Leon,* the Supreme Court held that a good faith exception applies to the Fourth Amendment exclusionary rule. *Leon*, 468 U.S. at 905. The good faith exception provides

> that the fruits of a constitutionally infirm search need not necessarily be suppressed unless: (1) the warrant contained a knowing or reckless falsehood; (2) the issuing judge acted as a mere "rubber stamp" for the police; or (3) the warrant and affidavit, even after extending appropriate deference to the issuing judge's determination, did not establish probable cause or

> possessed a technical deficiency such that the executing officers cannot reasonably assume the warrant to be valid.

United States v. Logon, 250 F.3d 350, 366 (6th Cir. 2001)(citing *Leon*, 468 U.S. at 919-923). Jarrell focuses his "inquiry on ... 'whether a reasonably well-trained officer would have known that the search was illegal despite the magistrates [sic] authorization[.]" In other words, Jarrell argues under the third prong above that the executing officers in this case could not have reasonably assumed that the warrant was valid.

As discussed above, Agent Watters relied on the informant's tip, his surveillance of the home, his experience in law enforcement, the power usage records, and the thermal imaging. At the time Agent Watters used the thermal imaging, the issue of whether thermal imaging constituted a search under the Fourth Amendment had not been decided by the Sixth Circuit, *United States v. Black*, 1999 U.S. App. LEXIS 9146 (6th Cir. May 11, 1999)(remanding to district court, among other issues, the issue of whether thermal imaging constituted a search under the Fourth Amendment); however, several other circuits had found that the warrantless use of thermal imaging on properties ranging from out buildings to homes was constitutional under the Fourth Amendment. *See United States v. Kyllo*, 190 F.3d 1041 (9th Cir. 1999); *United States v. Robinson*, 62 F.3d 1325 (11th Cir. 1995); *United States v. Myers*, 46 F.3d 668 (7th Cir. 1995); *United States v. Ford*, 34 F.3d 992 (11th Cir. 1994); and *United States v. Pinson*, 24 F.3d 1056 (8th Cir. 1994). Only the Tenth Circuit at the time had found that the use of thermal imaging constituted a search thus requiring a warrant under the

Constitution. *See United States v. Cusumano*, 67 F.3d 1497 (10th Cir. 1995), *vacated on other grounds*, 83 F.3d 1247 (10th Cir. 1996(*en banc*). Subsequently, the Supreme Court in *Kyllo* held that thermal imaging does constitute a search and that "it will remain for the District Court to determine whether, without the evidence it provided, the search warrant issued ... was supported by probable cause-- and if not, whether there is any other basis for supporting admission of the evidence that the search pursuant to the warrant produced." *Kyllo*, 533 U.S. at 40. In the case at bar, the district court applied *Kyllo* and decided that without the thermal imaging, probable cause did not exist for the warrant, but a basis for supporting the admission of the evidence did exist through the *Leon* good faith exception.

Jarrell argues that because there was a split in the circuit courts regarding use of thermal imaging at the time the warrant was issued, Agent Watters's reliance on the warrant, which included the thermal imaging, was not made in good faith. The Court disagrees. Aside from the thermal imaging. Agent Watters also relied on the informant's tip, his corroboration of the informant's information, the electrical power usage records, and his knowledge as a police officer with experience in the area of marijuana growing cases. Therefore, even if Agent Watters had not considered the thermal imaging evidence, his actions cannot be categorized as unreasonable. Furthermore, his reliance on the thermal imaging evidence at a time when courts of appeals disagreed on the use of such imaging in the context of the Fourth Amendment cannot be said to be objectively unreasonable.

Jarrell next contends, essentially, that the information supplied by the informant was not necessarily credible or

reliable, that the corroboration was innocuous, and that the informant did not state how he or she was qualified to identify the plants as marijuana or their stage of growth. Based on the foregoing, he argues that Agent Watters "had no basis for good faith belief that marijuana was on the premises at the time he executed the search warrant."

The Court finds that Agent Watters acted in good faith when he relied on the search warrant issued pursuant to his Affidavit that provided not only the information received from the informant, but also Agent Watters's corroboration of the information, his further investigations using the power usage records and the thermal imaging, and his many years of experience in this field. Therefore, the warrant was not so deficient as to render the agent's reliance on it unreasonable.

Relying on *United States v. Weaver*, 99 F.3d 1372 (6th Cir. 1996), Jarrell's final argument is that the affidavit supporting "the search warrant was insufficient because it was a bare-bones affidavit that did not show probable cause." In *Weaver,* this Court found the affidavit at issue was a "bare-bones" affidavit and "failed to provide sufficient factual information for a finding of probable cause." *Id.* at 1380. The officer attesting in *Weaver* relied on an informant's hearsay information regarding the defendant possessing and growing marijuana. *Id.* at 1375. The officer did nothing more than verify that the defendant was named on the utilities account for the residence in question. *See id.* Based on this information, the officer filled in a boilerplate affidavit, which was then used to issue the search warrant.

The *Weaver* Court defined a "bare-bones" affidavit as "an affidavit that states suspicions, beliefs, or conclusions,

without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge ...." *Id.* at 1378. The affidavit in the case at bar is far from being a "bare-bones" affidavit. The affidavit in this case bares no resemblance to the affidavit in *Weaver,* in that it is not boilerplate, is particularized, and is supported by corroboration; therefore, the Court's holding in *Weaver* does not apply to the case at bar. Accordingly, the district court's application of the *Leon* good faith exception and its denial of Jarrell's Motion shall be affirmed.

Downward Departure:

At the sentencing hearing, Jarrell moved for a downward departure pursuant to USSG § 5K2.13, which provides, in pertinent part, "[a] sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity." Jarrell contends that while the court recognized his mental problems, the court nevertheless refused to grant the downward departure. Jarrell argues that the court's denial was clearly erroneous, an incorrect application of the guidelines, and that there is a factual issue regarding whether the district court "was aware of his discretion to depart downward on grounds of diminished capacity."

A district court's denial of a downward departure is only reviewable by this Court "if the district court incorrectly believed it lacked the authority to grant such a departure as a matter of law." *United States v. Owusu*, 199 F.3d 329, 349 (6th Cir. 2000)(citations omitted). The district court "has no duty 'to state alternatively that he knows he possesses the power to make a downward departure, but declines to do

so.'" *Id.* (citation omitted). This Court is "reluctant to treat as ambiguous a ruling which does not affirmatively state that the judge knew he could depart downward but failed to do so." *Id.* (citation and quotations omitted). Therefore, this Court assumes that the district court exercised its proper discretion when it concluded that the downward departure was not warranted. *Id.*

In the case at bar, the record reveals that Jarrell made his motion for downward departure at the sentencing hearing. In response, the district court opined,

> Yeah. Well, I'd just have to say, I know you've got some problems, but I don't see that there is any significantly reduced mental capacity here. He does have a bipolar problem. He does have some difficulties with controlled substances, well, and alcohol, too, but because he's had the use of -- I see Paragraph 33, 34, of the pre-sentence report, he's been evaluated at Valley and other places. But I don't see, I don't see this as a significantly reduced mental capacity.

Because there is nothing in the record to indicate that the district court incorrectly believed that it lacked the authority to grant the downward departure as a matter of law, Jarrell is not entitled to appeal the court's decision. *See Owusu*, 199 F.3d at 349. Accordingly, Jarrell's appeal on this issue shall be dismissed for lack of jurisdiction. *United States v. Shabazz*, 263 F.3d 603, 611-12 (6th Cir. 2001).

For the reasons set forth above, the district court's denial of Jarrell's Motion to Suppress is **AFFIRMED** and Jarrell's

appeal of the downward departure issue is **DISMISSED.**

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

No. 1:00-cr-137
Edgar

[Filed August 9, 2001]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
TOMMY D. JARRELL	)
	)

MEMORANDUM AND ORDER

On December 20, 1999, Rodd Watters ("Watters" or "Agent Watters"), an agent of the Tennessee Bureau of Investigation, requested, with supporting affidavit, a warrant for the search of the residence (including outbuildings) of defendant Tommy D. Jarrell ("Jarrell"). Agent Watters' purpose was to search for evidence of a marijuana growing operation at Jarrell's residence, 507 Tunnel Boulevard in Chattanooga. Hamilton County General Sessions Court Judge

Bob Moon issued the warrant. *(See* Court File No. 17, Ex.[1]). Agent Watters and other officers executed the warrant the next day, December 21. During their search of a detached garage at 507 Tunnel Boulevard, the officers located and Seized approximately one hundred twenty-four (124) growing marijuana plants as well as equipment and materials used to grow marijuana.

This matter is before the Court on the motion (Court File No. 8) by defendant Jarrell to suppress the evidence seized during the December 21, 1999 search. Jarrell argues Judge Moon issued the warrant on less than probable cause, and thus the resulting search contravened the Fourth Amendment's prohibition on unreasonable searches and seizures.

I. Contents of Agent Watters' Affidavit

Agent Watters presented the following information to Judge Moon in affidavit form.

On December 1, 1999, an unnamed informant contacted Agent Kim Rively of the Federal Bureau of Investigation Task Force. While the informant had never provided information to Agents Rively or Watters in the past, the informant was "not working off any charge, nor are any charges pending, nor has the informant asked for any reward in this case." Aff. at 1. This informant told Agent Rively that Jarrell was

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[1] The search warrant and supporting affidavit are attached as an exhibit to Court File No. 17. The Court will refer to the supporting affidavit as "Aff."

growing marijuana in a garage at the rear of the property at 507 Tunnel Boulevard. The informant reported having personally seen the active growing operation within the preceding thirty days. The informant also stated Jarrell possessed about $20,000.00 worth of growing equipment, had suspended lights from the ceiling of the garage, and had posted two large Rottweiler dogs outside the garage.

Agent Rively conveyed the informant's message to Agent Watters on December 10. After receiving the information from Agent Rively, Agent Watters and an agent from the Alcoholic Beverage Commission traveled to 507 Tunnel Boulevard to conduct a surveillance of the property. Agent Watters learned, as the informant had described to Agent Rively, the main house was a single-story wood home with a detached wood garage at the rear of the property. A piece of plywood covered some of the detached garage, suggesting to Watters the resident desired to keep out unwanted light and obscure the visibility of the activities in the garage. Watters also noticed a "Beware of Dog" sign at the front of the property, a large Rottweiler chained near the detached garage, and two or three electrical extension cords and a garden hose running from the main house to the garage. The large dog, power cords, and hose were, according to Watters' training and experience, characteristic of clandestine energy- and water-dependent marijuana growing operations.

The same day, Agent Watters examined 507 Tunnel Boulevard, he issued a subpoena to the Electric Power Board for the electricity use records for507 Tunnel Boulevard during a two year period. He also obtained the records for the neighboring structures of similar size at 503 and 505 Tunnel Boulevard. Comparison of the three residences' records

revealed 507 Tunnel Boulevard's consumption as considerably higher than that of its neighbors: two to three times more than 505 and four to five times more than 503. The higher electricity usage correlated, Agent Watters understood, with an indoor marijuana, growing operation requiring considerable energy. Agent Watters also learned the billing for power at 507 Tunnel Boulevard was in the name of Andrew C. Stanley rather than Jarrell. According to Agent Watters, an operator of an indoor marijuana grow commonly will have electricity billed in another person's name.

Based on these discoveries, Agent Watters decided to conduct a thermal imaging scan of 507 Tunnel Boulevard. The purpose of this scan, Agent Watters explained, was:

> to determine the presence of "Grow Lights," which are pressure sodium or metal halide lamps from 400 to 1000 watts and the sources of extreme heat. Indoor cannabis is best cultivated at a temperature of from 68 to 72 degrees Fahrenheit, therefore, an indoor cultivation site must be vented to allow the heat from the grow lamps to escape and be replaced by ambient air. I planned my thermal imaging to take place on December 16th, 1999 at approximately 11:00 pm for an optimum result as the temperature of the surfaces will have cooled to a constant reading.

Aft. at 3. Agent Watters conducted the thermal imaging scan from about 11:15 to 11:30 on the evening of December 16. He observed a strong heat signature emanating from the detached garage at the rear of 507 Tunnel Boulevard, a fact he described as "consistent with an indoor cannabis cultivation site." *Id.* Agent Watters also conducted thermal

imaging scans of two other detached garages near 507 Tunnel Boulevard, with neither revealing a heat signature comparable to that of 507 Tunnel Boulevard.

On the basis of these sworn representations from Agent Watters, Judge Moon issued a search warrant. The warrant covered the "residence located at 507 Tunnel Blvd. Chattanooga Tn., described as a single story, single family dwelling consisting of wood siding, grey in color, with white shutters, covered front porch, and an unattached wood garage at the rear of the residence." (Court File No. 17, Ex.).

II. Standard of Review

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend IV. The concept of probable cause comprehends "'reasonable grounds for belief, supported by less than *prima facie* proof but more than mere suspicion.'" *United States v. King*, 227 F.3d 732, 739 (6th Cir. 2000) (quoting *United States v. Bennett*, 905 F.2d 931,934 (6th Cir. 1990)). When determining if probable cause exists to issue a search warrant, a "judge must 'make a practical common-sense decision whether, given all the circumstances set forth in the [supporting] affidavit ... there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *United States v. Campbell*, — F.3d — , 2001 WL 748166, at *2 (6th Cir. May 14, 2001) (quoting *Illinois v. Gates*, 462 U.S. 213, 238

(1983)). *See also United States v. Williams*, 224 F.3d 530, 532 (6th Cir. 2000) (quoting *Gates* definition).

This Court extends a great deal of deference to Judge Moon's determination of probable cause, United States v. Murphy, 241 F.3d 447, 457 (6th Cir. 2001) (citations omitted). Only if Judge Moon arbitrarily exercised his discretion to issue a search warrant may this Court reverse his probable cause determination. *Id.; Williams,* 224 F.3d at 532; *United States v. Allen*, 211 F.3d 970, 973 (6th Cir. 2000) (en banc). "Moreover, review of an affidavit and search warrant should rely on a 'totality of the circumstances' determination, rather than a line-by-line scrutiny." *United States v. Greene,* 250 F.3d 471,478 (6th Cir. 2001) (citing *Allen*, 211 F.3d at 973). This Court "must examine the totality of the circumstances and determine if the state court judge had a 'substantial basis' for concluding that a 'search warrant would uncover evidence of wrongdoing.'" *Campbell*, 2001 WL 748166, at *4 (quoting *United States v. Songere,* 30 F.3d 51, 53 (6th Cir. 1994)). *See also Greene*, 250 F.3d at 479 ("appropriate inquiry is whether the information in [the] affidavit established a substantial basis for a finding by the magistrate that there was probable cause that" evidence of wrongdoing would be found at the location to be searched).

III. Analysis

Although the Sixth Circuit has instructed reviewing courts not to undertake "line-by-line scrutiny" of an affidavit in support of a search warrant, *Greene*, 250 F.3d at 478, Jarrell has raised concerns about certain specific items appearing in Agent Watters' affidavit. Thus, before the Court can proceed to look at the totality of the circumstances, relevant portions

of Agent Watters' affidavit require separate discussion

A. Thermal Imaging Scan

Jarrell contends, and the United States concedes, Watters' conducting the thermal imaging scan of 507 Tunnel Boulevard and neighboring residences constituted an unreasonable warrantless search in violation of the Fourth Amendment. At the time Watters' undertook the thermal scan a number of the federal appellate courts had held the practice comported with the Fourth Amendment. *See United States v. Kyllo,* 190 F.3d 1041, 1046 (9th Cir. 1999), *rev'd sub nom Kyllo v. United States,* 121 S. Ct. 2038 (2001); *United States v. Robinson,* 62 F.3d 1325, 1330 (11th Cir. 1995); *United States v. Ishmael,* 48 F.3d 850, 855-57 (5th Cir. 1995); *United States v. Myers,* 46 F.3d 668, 669-70 (7th Cir. 1995); *United States v. Pinson,24* F.3d 1056, 1058-59 (8th Cir. 1994). *But see United States v. Cusumano,* 67 F.3d 1497, 1506 (10th Cir. 1995) ("use of a thermal imager upon the home intrudes upon an expectation of privacy that society deems reasonable"), *vacated en banc on other grounds*, 83 F.3d 1247 (10th Cir. 1996); *United States v. Elkins,* 95 F. Supp. 2d 796, 807-13 (W.D. Tenn. 2000)(surveying the appellate cases on thermal imaging and concluding the practice amounts to a search). Subsequently, the Supreme Court has ruled definitively on the issue, holding the use of thermal imaging constitutes a search within the meaning of the Fourth Amendment. *Kyllo,* 121 S. Ct. at 2046. Because thermal imaging amounts to a search, "[w]here the government seeks to capture a heat signature for law enforcement purposes in the face of a reasonable expectation of privacy (*e.g.*, a home), the police will simply have to obtain a warrant." *Elkins,* 95 F. Supp. 2d at 813.

Agent Watters did not obtain a warrant to conduct the thermal imaging scan of 507 Tunnel Boulevard or the nearby residences. Accordingly, that search violated the Fourth Amendment. The Court must therefore exclude the results of the thermal imaging scan in examining whether probable cause supported Judge Moon' s issuance of the warrant. *See Kyllo,* 121 S. Ct. at 2046 (after holding thermal imaging constituted a search, remanding "for the District Court to determine whether, without the evidence it provided, the search warrant issued in this case was supported by probable cause -- and if not, whether there is any other basis for supporting admission of the evidence that the search pursuant to the warrant produced."). In the absence of the thermal imaging scan, the remaining affidavit items for consideration of probable cause are the informant's statements, Agent Watters' December 10 surveillance of 507 Tunnel Boulevard, and the energy use records for 507 Tunnel Boulevard and neighboring homes.

B. Remaining Items

1. The Informant's Statements

a. Reliability

Jarrell questions the appropriate weight, if any, to be given the informant's statements to Agent Rively. The Sixth Circuit, sitting en banc last year, articulated the general rule applicable to assessing an informant's representations: "where a known person, named to the magistrate, to whose reliability an officer attests with some detail, states that he has seen a particular crime and particular evidence, in the recent past, a neutral and detached magistrate *may* believe that evidence of

a crime will be found." *Allen,* 211 F.3d at 976 (emphasis in original). Although the informant described a particular crime (growing marijuana) and particular evidence (plants, $20,000.00 worth of growing equipment, and suspended lights) to Agent Rively, the informant's representations fall short of the remaining *Allen* criteria.

Neither Judge Moon nor this Court could properly determine probable cause based solely on the representations of the informant. The affidavit does not contain sufficient information to warrant a conclusion the informant was reliable. There was, however, some indicia of the informant's reliability in that the informant had no known motive to falsify or exaggerate, because the person was not "working off any charge," and had not sought a reward. (Aft. at 1).

b. Staleness

By the time Judge Moon was reviewing the affidavit on December 20, the informant's statements concerned observations made several weeks in the past. The informant reported the marijuana grow to Agent Rively on December 1, claiming to have seen the plants and materials at 507 Tunnel Boulevard "in the last thirty (30) days." (Aft. at 1). Agent Rively shared these statements with Agent Watters ten days later, on December 10. Thus, the informant would have seen the growing marijuana as many as fifty days before Judge Moon learned of it on December 20. According to Jarrell, this passage of time rendered the informant's representations stale and consequently worthless.

The Court applies a totality-of-the-circumstances inquiry, similar to that applied to the probable cause inquiry generally,

in a staleness determination. *Greene,* 250 F.3d at 480. This flexible, case-specific inquiry rests on a number of factors, including:

> "[T]he character of the crime (chance encounter in the night or regenerating conspiracy?), the criminal (nomadic or entrenched?), the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), the place to be searched (mere criminal forum of convenience or secure operational base?)."

Id. at 480-81 (quoting *United States v. Spikes,* 158 F.3d 913,923 (6th Cir, 1998)). See also Murphy, 241 F.3d at 458 (listing these considerations as germane to the "question of staleness [which] depends on the inherent nature of the crime"). "As these variables demonstrate, even if a significant period has elapsed since a defendant's last reported criminal activity, it is still possible that, depending upon the nature of the crime, a magistrate may properly infer that evidence of wrongdoing is still to be found on the premises." *Spikes,* 158 F.3d at 923 (citations omitted).

In recently applying the staleness inquiry, in *Greene,* the Sixth Circuit highlighted two more specific principles. These principles pertain to the matters contained in Agent Watters' affidavit and, as in *Greene,* lead to the conclusion the informant's representations are not prohibitively stale. First, "[e]vidence of ongoing criminal activity will generally defeat a claim of staleness." *Greene,* 250 F.3d at 481 (citing *United States v. Canan,* 48 F.3d 954, 958 (6th Cir. 1995). Second, "where the criminal activity occurred 'in a secure operational base,' the passage of time becomes less significant." *Id.*

(citing *Spikes,* 158 F.3d at 924; *United States v. Yates,* 132 F. Supp. 2d 559, 565 (E.D. Mich. 2001)). The informant stated to Agent Rively personal observation of an "active" marijuana growing operation consisting of $20,000.00 worth of equipment and taking place within the confines of an individual's private garage, with large dogs stationed outside. (Aff. at 1). The Court concludes this information, even if as much as fifty days old when presented to Judge Moon, describes an "ongoing criminal activity" occurring within a "secure operational base." Accordingly, despite the passage of some time between the informant's observing the grow and Agent Watters' presenting the information to Judge Moon, the information was not so stale as to prohibit Judge Moon from determining there was probable cause the marijuana grow was still underway on December 21.

2. Agent Watters' Investigation

Agent Watters recognized the need to supplement the informant's representations with significant corroboration. *See, e.g., Williams,* 224 F.3d at 533; *Allen,* 211 F.3d at 976; *United States v. Leake,* 998 F.2d 1359, 1365 (6th Cir. 1993). The Court thus turns to the remaining contents of Agent Watters' affidavit, obtained through his efforts to corroborate the tipster's representations.

By visiting 507 Tunnel Boulevard on December 10, Agent Watters learned a number of facts directly confirming some statements of the tipster, such as the presence of the Rottweiler and the general description of the house and garage. Agent Watters also made independent observations, such as the extension cords and hose between the house and garage and the plywood-covered windows and doors, his

experience as a narcotics and cannabis investigator suggested were characteristic of marijuana growing operations. *(See* Aft. at 2). Agent Watters also obtained the energy use records for 507 Tunnel Boulevard and similar neighboring residences from the Electric Power Board. Comparing the use among the three homes revealed 507 Tunnel was consuming a substantially larger quantity of electricity than its neighbors. Agent Watters further learned the energy billing was in the name of someone other than Jarrell. This was significant, because Agent Watters was aware of piece of the "normal practice for persons involved in indoor cannabis operations to not have *[sic.]* bills put in their own names." (Aft. at 3).

Jarrell argues Agent Watters' December 10 discoveries were nothing other than innocent facts and do not truly corroborate the informant's representations. Jarrell may have a point in this regard, were it this Court's job to parse the contents of Agent Watters' affidavit and analyze each bit of information in a vacuum. However, a probable cause determination must encompass the totality of the circumstances, looking at all the contents of Agent Watters' affidavit together and asking if, as a whole, they suggest "a fair probability that contraband or evidence of a crime will be found in a particular place." *Murphy,* 241 F.3d at 457 (citations and internal quotation marks omitted).

Removing from consideration, as the Court must after *Kyllo,* the thermal imaging data and attributing comparatively little weight to the statements of the informant (whose reliability Agent Watters did not fully accept himself (*see* Tr. of Hr'g on Mot. to Supp., Court File No. 21, at 2)), the Court concludes the question of probable cause is quite close, but just misses the mark. In the absence of the thermal

imaging data the Court concludes Agent Watters' affidavit falls short of establishing probable cause. However, had the Supreme Court's decision in *Kyllo* gone the other way, there would have been ample probable cause here.

C. *Leon* Good-Faith Exception

Even though the Court concludes Agent Watters, affidavit fails to show probable cause, the Court, under the "good-faith exception" to the exclusionary rule, will deny Jarrell's motion to suppress the evidence obtained in the search. In *United States v. Leon,* 468 U.S. 897 (1984), the Supreme Court held the Fourth Amendment exclusionary rule should not prohibit "the use of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a neutral and detached magistrate that is later found to be invalid." *United States v. Harris,* – F.3d – , 2001 WL 694509, at *4 (6th Cir. June 21, 2001). The *Leon* exception provides this evidence need not be suppressed unless:

> (1) the warrant contained a knowing or reckless falsehood; (2) the issuing judge acted as a mere "rubber stamp" for the police; or (3) the warrant and the affidavit, even after extending appropriate deference to the issuing judge's determination, did not establish probable cause or possessed a technical deficiency such that the executing officers cannot reasonably assume the warrant to be valid.

United States v. Logan, 250 F.3d 350, 366 (6th Cir. 2001) (citing *Leon,* 468 U.S. at 922-23). Jarrell does not argue the warrant or supporting affidavit contains knowing or reckless falsehoods. He also does he not argue Judge Moon abandoned

his neutral judicial role in issuing the warrant. Instead, Jarrell suggests the warrant and affidavit are so unsupported by probable cause as to preclude application of the *Leon* exception.

In evaluating Jarrell's contention, the Court asks whether Agent Watters' affidavit "is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *United States v. Watkins,* 179 F.3d 489, 495 (6th Cir. 1999) (quoting *United States v. Brown,* 147 F.3d 477, 485 (6th Cir. 1998)). *See also United States v. Scott,* – F.3d – , 2001 WL 826405, at *2 (6th Cir. July 24, 2001) ("The focus of the inquiry is 'whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization.'" (quoting *Leon,* 468 U.S. at 922 n.23)); *Allen,* 211 F.3d at 977 (Gilman, J., concurring) (quoting same *Leon* language as "proper test of an officers good faith"). Moreover, the Court looks at the complete contents of the affidavit, including the thermal imaging data, at the time Agent Watters executed the search. *Cf. Massachusetts v. Sheppard,* 468 U.S. 981,990 (1984) (applying *Leon* exception where officer conducted search relying on a statute later declared unconstitutional).

In December 1999, when Agent Watters conducted the thermal imaging scan the Fifth, Seventh, Eighth, and Ninth Circuits had all approved the use of thermal imaging procedures as comporting with the Fourth Amendment. *See Kyllo,* 190 F.3d at 1046; *Robinson,* 62 F.3d at 1330; *Ishmael,* 48 F.3d at 855-57; *Myers,* 46 F.3d at 669-70; *Pinson,* 24 F.3d at. 1058-59. *See also United States v. Black,* No. 99-6117, 2001 WL 427769, at *7 (6th Cir. Apr. 18, 2001) (per curiam) (Wellford, J., concurring) ("I am persuaded by the

virtuously unanimous authority on the thermal imaging issues that the use of this equipment did not violate defendants' constitutional rights"). Among the federal appellate courts, only the Tenth Circuit had rejected the practice. See Cusumano, 67 F.3d at 1506. Given the case authority supporting the use of thermal imaging, Agent Watters reasonably believed the results of the scan would properly help establish probable cause. As Judge Gilman (joined by Chief Judge Martin) explained in his concurrence in *Allen,* "an officer should not be expected to predict that warrant practices similar to what the courts have found acceptable in the past will subsequently fail to withstand the analysis of evolving legal decisions." *Allen,* 211 F.3d at 978 (Gilman, J., concurring).

Given the Court's conclusion Agent Watters' affidavit presented a close question of probable cause even when the thermal imaging data was excluded, the Court is convinced a properly-trained officer would not have acted unreasonably in believing the warrant was supported by probable cause. Accordingly, the Court concludes the *Leon* "good-faith exception" to the exclusionary rule should apply to the search warrant issued and executed in this case. Jarrell's motion (Court File No. 8) to exclude fruits of the search pursuant to that warrant is hereby **DENIED**.

SO ORDERED.

ENTER:

/s/ _____
R. ALLAN EDGAR
CHIEF UNITED STATES DISTRICT JUDGE